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No. 93-900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DANIEL M. DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

The government concedes that "[t]he courts of appeals have adopted different formulations of the prima facie standard" used to determine whether the attorney-client privilege should be overcome. (Brief of United States at 6) In particular, as the government expressly acknowledges, "[t]he Seventh Circuit . . . has framed the inquiry somewhat differently" from the other Circuits. (*Id.* at 8)

The government maintains that these differences are "semantic," and that all of the formulations are essentially equivalent to the probable cause standard used in the Second Circuit. (Brief of United States at 9) In *United States v. Zolin*, 491 U.S. 554 (1989), however, this Court signaled that the probable cause standard is too low. There the Court held that a showing of probable cause is sufficient to allow a court to conduct *in camera* review of privileged materials to determine if a prima facie showing has been made, but it stated that this is "a lesser evidentiary showing . . . than is required ultimately to overcome the privilege." *Id.* at 572. Indeed, it would make no sense for the two standards to be the same. Yet that is the import of the government's position here. Thus even if the government is correct that most or all of the Circuits follow the "probable cause" standard, that standard is too low under *Zolin*.

The government also maintains that the showing made in the present case would pass muster in any of the Circuits. (Brief of United States at 9-10) We respectfully disagree. The present case involved a claim that a document was subject to subpoena and should have been produced. (As the government correctly notes, *the document was produced by Petitioner* (Brief for United States at 3), but the prosecution contended it should have been produced earlier.) Petitioner argued that the document was not, in fact, within the scope of the subpoena. In holding that the attorney-client privilege had been overcome, the Seventh Circuit noted only that it was "plausible" that the document "could have" fallen within the subpoena's scope. (Pet. App. 9) In short, the court required no proof at all, but merely an allegation. The court's suggestion that the issue was properly one for the jury was, we respectfully suggest, an abdication of its responsibility under *Zolin* and *Clark v. United States*, 289 U.S. 1, 15 (1933) ("it

would be absurd to say that the privilege could be got rid of merely by making a charge of fraud").

None of the other Circuits permit the privilege to be overcome on such sparse proof. In the Eighth Circuit, for example, the "showing" made here would not have been enough; in the case of *In re Grand Jury Subpoenas Duces Tecum*, 773 F.2d 204, 205-07 (8th Cir. 1985), that court refused to declare the privilege forfeit even though it was shown that counsel had failed to produce documents that were *clearly* subject to a subpoena.

In sum, (1) the "probable cause" standard that the government claims is prevalent is inconsistent with *Zolin*; and (2) this case provides a perfect example of a showing that is, or should be, insufficient under *any* standard.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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